

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ERIC WILTON BURTON,

Petitioner,

v.

MATTHEW CATE, Secretary of California
Department of Corrections and Rehabilitation,

Respondent.

Civil No. 08cv0325-LAB (POR)

**ORDER DENYING MOTION TO
DISMISS WITHOUT PREJUDICE AND
ORDER FOR PETITIONER TO FILE
LODGMNT 17**

[Document No. 101]
[Document No. 126]

On June 20, 2008, Eric W. Burton, a state prisoner proceeding *pro se*, filed a First Amended Petition for Writ of Habeas Corpus ("FAP") pursuant to 28 U.S.C. § 2254. (Doc. 21.) On October 30, 2008, Petitioner filed a Motion for Stay and Abeyance. (Doc. 47.) On December 10, 2008, the Court issued a Report and Recommendation that the Motion for Stay and Abeyance be granted (Doc. 65), which the Honorable Larry A. Burns adopted on April 7, 2009. (Doc. 89.)

On July 7, 2009, Respondent filed a Motion to Dismiss the FAP, asserting it is a mixed petition, subject to dismissal, because Petitioner failed to exhaust his available state court remedies with respect to Ground 3 of the FAP. (Doc. 101). On July 27, 2009, Petitioner filed an opposition to the motion, contending he fairly presented and therefore exhausted Ground 3 in the California Supreme Court. (Doc. 102.) Petitioner claims he clearly laid out the facts in his state habeas petition, evidenced by references to the reporter's transcript in the statement of facts. (Doc. 102 at 4.)

//

1 On October 23, 2009, Petitioner filed a Motion of Argument in re to Respondent's Lodgment
2 17, his Petition for Writ of Habeas Corpus filed with the California Supreme Court. (Doc. 126.)
3 Petitioner contends Respondent filed an illegible copy of his Petition for Writ of Habeas Corpus to
4 the California Supreme Court, and thereby requests the Court "not to rely" on Lodgment 17 in
5 adjudicating Respondent's Motion to Dismiss. (Id. at 2.) Petitioner further asserts he is in
6 possession of a "clearly readable copy" of his California Supreme Court Petition. (Id.)

7 Upon the Court's review of Lodgment 17, it is evident pages 8-10, 16-18, and 21 are not
8 legible. (Lodgment 17.) Based thereon, IT IS HEREBY ORDERED:

9 1. In light of Petitioner's assertion he is in possession of a legible copy of his state
10 habeas petition, Petitioner shall file a legible copy of his Petition for Writ of Habeas Corpus, filed
11 with the California Supreme Court on September 4, 2008, case no. S166540, on or before **January**
12 **11, 2010**.

13 2. Due to the illegible pages in Lodgment 17, it is unclear which facts Petitioner laid out
14 with regard to Ground 3 in his state habeas petition. Accordingly, the Court cannot determine
15 whether Petitioner has exhausted his state court remedies with respect to Ground 3. Thus,
16 Respondent's Motion to Dismiss is hereby DENIED without prejudice. (Doc. 101.)

17 3. If Respondent still contends Petitioner has failed to exhaust his state remedies with
18 regard to Ground 3 after Petitioner files a legible copy of Lodgment 17, Respondent shall file a
19 motion to dismiss pursuant to Rule 4 of the Rules Governing § 2254 Cases no later than **February**
20 **11, 2010**. A hearing date is not required for the motion to dismiss.

21 4. If Respondent files a motion to dismiss, Petitioner shall file his opposition, if any, to
22 the motion no later than **March 11, 2010**. At the time the opposition is filed, Petitioner shall lodge
23 with the Court any records not lodged by Respondent which Petitioner believes may be relevant to
24 the Court's determination of the motion.

25 //

26 //

27 //

28 //

1 5. Unless the Court orders otherwise, Respondent shall not file a reply to Petitioner's
2 opposition to a motion to dismiss. If the motion is denied, the Court will afford Respondent
3 adequate time to respond to Petitioner's claims on the merits.

4 **IT IS SO ORDERED.**

5 DATED: December 11, 2009

6 
7 _____
8 LOUISA S PORTER
United States Magistrate Judge

9 cc: The Honorable Larry A. Burns
10 all parties
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28